No. 80.

Brief of Birney for P. C.

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In the Supreme Court of the United States

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WILLIAM F. HOLTZMAN, PLAINTIFF IN ERROR,

vs.

WILLIAM G. DOUGLAS ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

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LAW REPORTER PRINT.

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STATEMENT OF THE CASE.

The plaintiff in error, who was the plaintiff below, filed his declaration in ejectment May 31, 1889, to recover a lot of land in the city of Washington. The pleas were not guilty and were not jointly guilty. .

At the trial plaintiff proved a regular title in fee in himself deraigned by various conveyances and descents from the United States, and the possession of defendants through their tenant William Rothwell.

The defendants claimed title by adverse possession founded upon a tax deed dated July 6, 1865, made to William Douglas, whose heirs at law they are.

No proof was tendered to show the validity of the deed, and it was admitted only as tending to show color of title (4).

The testimony to show adverse possession made the following case:

In 1865 Richard Rothwell was owner of a lot abutting at

the rear of the lot in suit. He claimed no right in, or title to, the lot in suit and did not know who was the owner thereof. In the latter part of 1865, Rothwell purchased some old pontoons and marble which he placed on his lot and on the lot in suit.

The pontoons covered a space about one-fourth the size of the court room (8) and the marble a space about twenty feet square just adjoining Rothwell's lot (8). It "was a sort of overflow" from his lot. *He made no further use of the lot until 1870*, when he put upon it some other stone he had bought from which to make monuments (9). There was no building on the lot before 1874, and there was no fence about it at any time.

In September or October, 1867, Mrs. Douglas, widow of William and mother of the defendants, visited Rothwell and told him she owned the lot. He then orally agreed to pay her as rent the amount of the yearly taxes, and did so pay until the bringing of this suit. She paid the taxes to the government. In 1887 Mrs. Douglas died, and Rothwell after that recognized the defendants as her successors and paid rent to them. At the time of the arrangement with Mrs. Douglas in 1867, there were no buildings on adjoining lots except a small shanty on the west side. The lot was part of a commons where there were no fences, and no houses.

Plaintiff on rebuttal proved that the first scattered stone appeared on the lot in 1871 or 1872, and that there were scattered blocks on different parts of the commons without regard to boundaries of lots, and that Rothwell's lot was fenced at the back.

One exception was taken in the course of the testimony. The other exceptions were to the refusal of prayers for instructions by the plaintiff and the granting of prayers asked by defendants.

ASSIGNMENT OF ERRORS.

1. The court erred in overruling the objection of the plaintiff to the question asked the witness Rothwell and set out on page 8 of the Record.

2. The court erred in holding that the testimony for the defendants tended to establish title in them by adverse possession for twenty years before suit, and in refusing the first, second and third prayers of the plaintiff upon this subject.

3. The court erred in rejecting the second prayer of the plaintiff.

4. The court erred in rejecting plaintiff's third prayer.

5. The court erred in granting the prayer of the defendants recited in the record.

ARGUMENT.

The first exception was the overruling of the objection to the question asked the witness Rothwell (8). There having been no testimony that the lot was known by any particular name the witness was asked:

"Was this lot ever known in the neighborhood by any other name than the Douglas lot?" Objected to as incompetent and as leading. Objection being overruled and an exception noted the witness answered, "No, sir."

The question assumed that the lot had an established designation (as to which there was no evidence) and clearly suggested to the very willing witness the answer desired of him. If it is error to ask a leading question of such a witness then there was error here.

But the evidence that the lot was known as "the Douglas lot" was inadmissible for any purpose. It was hearsay and did not come within any of the recognized exceptions to the rule excluding hearsay testimony. Hearsay is admissible in cases of pedigree and in cases of prescriptive

rights and customs and other claims of a public nature. "They are all cases of general right, affecting a number of persons having a common interest."

The question is fully covered by the ruling and opinion of this court in Ellicott *vs.* Pearl, 10 Peters, 412, 434.

The Acts of Alleged Adverse Possession.

This suit was brought May 31, 1889. The vital question for the jury was, *Were the defendants in adverse possession prior to May 31, 1869?* Our contention is that there was no evidence to sustain the claim of adverse occupancy prior to 1870 at the best, and that the jury should have been so instructed.

The facts attempted to be proved were, that in 1865 Rothwell, *claiming no right whatever* in the lot, deposited upon it some blocks of marble and some pontoons. He had nothing else upon it (8) and himself testified:

> "I got the marble for use in building a house and the extra pieces I put on this lot, and just let them lie there" (8).

He did no further act upon the ground until 1870, but in 1869 he entered into an oral agreement with Mrs. Douglas, *known only to themselves*, that he would pay each year to her the amount of the taxes to be assessed.

The lot was not fenced or built upon in any way, and there was no indication of occupancy by any one, except for the presence of the marble and pontoons placed there in 1865. (Rothwell, test. 9).

Allowing every proper and natural inference to be drawn from the evidence, we insist that at least until 1870, and perhaps until 1874, *there was no act upon which title by adverse possession can be based.*

The second rejected prayer for instruction asked the court to rule that the mere retention upon the land by Rothwell, after his alleged secret attornment to Mrs. Douglas in 1867, of the

scattered stones placed there by him as a trespasser before that time, was not evidence of an actual and visible possession adverse to the plaintiff's grantors; and the third prayer took the ground that Rothwell's occupancy prior to such attornment in 1867 was as that of a tenant at will of the owner (the grantor of plaintiff in error), and that, to commence a holding of different and adverse character, there must be shown some act—

> "CALCULATED TO NOTIFY THE OWNER THAT HE HAD CEASED TO HOLD AS TENANT TO HIM AND CLAIMED IN SOME OTHER RIGHT."

It is submitted that both prayers were sound and should have been granted.

No Hostile Entry.

Nothing is better settled than that an entry upon land to be "adverse" must be in hostility to the true owner and under claim of title. When was the first ACT of hostility to the title of the plaintiff's grantors? To support the defense it must have been prior to May 31, 1869, but the only *act upon the land*, or entry before that time, which the testimony tended to show, was in 1865, when Rothwell, *claiming no title*, placed upon it the pontoons and marble which were suffered to remain.

But since he claimed no title the act not only was not in hostility to the owner, or adverse, but must be held to have been *a holding under that owner.*

This court has said:

> "Anyone in possession, with no claim to the land whatever, must, in presumption of law, be in possession in amity with and in subservience to that title."
>
> Harvey *vs.* Tyler, 2 Wallace, 328, 349.
>
> Tyler on Ejectment, pp. 860, 861.

The Attornment to Mrs. Douglas.

The only other act prior to 1870 upon which to base the claim of title by possession is the attornment to Mrs. Douglas in October, 1867. *This was a secret agreement not of a character to become known to the true owners,* or to other persons, and for this reason insufficient.

This court, in its latest decision upon this subject, says:

> "The possession must be actual and exclusive, adverse and hostile, *visible and notorious,* continued and uninterrupted."
>
> Wood *vs.* Cochran, 150 U. S. 598, 601.

So in Illinois the court said:

> "An occupation of land to be adverse must be such as to inform the neighborhood of its exclusive appropriation."
>
> Brook *vs.* Bruyn, 18 Ill. 539.

A case in Georgia is in point. The court said:

> "Therefore we think if B entered as a 'squatter' —entered disclaiming title—he was to be considered as holding the possession as tenant at will of the true owner, and as remaining such tenant *until something happened which might serve to notify the true owner that* B had ceased to hold as such tenant and was holding adversely to him. What this something would have to be we do not undertake to specify We think, however, it would have to be somewhat more than a private attornment of the tenant to another claimant of the land. He who has the title to land is deemed to be in the seizen and possession of it, and to continue so until ousted thereof by an actual possession in another under a claim of right. The possession of one who enters disclaiming title is to be considered as a possession by the consent of him who has the title; nor will a continuance of this possession avail to mature a title under the Statute of Limitations until the character of the possession

has been changed, *either by a declaration to that effect communicated to him who has the title, or by the exercise of acts of ownership* inconsistent with a tenancy by the consent of him who has the title."

Stamper et al. *vs.* Griffin, 20 Ga. 312.
Gay *vs.* Mitchell, 35 Ga. 139.

This doctrine thus clearly stated by the Georgia court is only a specific application to the facts before the court of the law as declared by this court in the case in 150 U. S., already cited.

The acts of Rothwell in 1865, in putting stone and material on the land, having been done as tenant at will of plaintiff's grantors, and in subservience to their title, surely a secret agreement of attornment, not brought to their notice, cannot be held to have terminated that tenancy, and to constitute that "adverse and hostile, visible and notorious" entry or conduct upon which defendants must rely to defeat the plaintiff's right of entry.

The first, second and third prayers should all have been granted on this ground alone.

II.

On another ground the first prayer for the plaintiff should have been granted, and the prayer granted to the defendant should have been rejected.

THERE WAS NO EVIDENCE OF ACTS OF OWNERSHIP by the defendants or their witness Rothwell sufficient to support the claim of adverse possession.

What appears is that Rothwell in 1865 allowed some marble and pontoons to "overflow" from his own adjacent land upon *a small part* of the lot in suit, and there it remained undisturbed until within twenty years.

The lot was not fenced; it was a part of a large common and its bounds were not defined; it was not cultivated; there was no building upon it, *and the only sign of occupancy or*

possession was a pile of pontoons covering a space "about as large as a quarter of the court room," and some marble occupying "a space about twenty feet square just adjoining" Rothwell's lot (8).

This was not "exclusive" occupancy, for all the rest of the lot was open and free to all users. Such occupancy in no case *could* affect more than the small spaces covered by the materials.

> "A possession not actual but constructive; not *exclusive but in participation* with the owner or others falls very far short of the kind of adverse possession which deprives the owner of his title."
>
> Ward *vs.* Cochran, 150 U. S. 608.

The placing of the pontoons and marble on the ground as an "overflow" from a large pile upon Rothwell's ground was not an indication of claim of ownership or dominion. It was an indecisive act entirely consistent with submission to the true owner's title, and not the foundation of adverse possession.

Having a woodpile on the land is not sufficient.

Miller *vs.* Downing, 54 N. Y. 631.

Erection of cowpen, ranging cattle and occasionally felling trees not sufficient.

Royal *vs.* The Lessee of Lisle et al., 15 Ga. 545.

To dig sand on and from the land from time to time and sell the same are but mere trespasses.

Parker *vs.* Wallis, 60 Md. 15.

Occupying a sugar place from year to year for the purpose of making sugar not sufficient.

Wilson *vs.* Blake, 53 Vt. 305.

Going upon wild land, digging and hunting for a corner and boundary lines, driving cattle on the land, and employ-

ing a man to break it in the following spring, are not such going into possession as will set the Statute of Limitations in operation.

Brown *vs.* Rose, 55 Iowa, 734.

Turning cattle on uninclosed land to pasture not sufficient.

Doe on the demise of Andrews *vs.* Mulford, 1 Hayes, 311.

Making an entry upon lands, cutting wood and splitting rails not sufficient.

Carroll et al. *vs.* Gillion, 33 Ga. 539.

There was nothing to indicate the bounds of possession. It is true that a fence is not necessary in all cases to constitute adverse possession (Ellicott *vs.* Pearl, 10 Pet. —; Ewing *vs.* Burnett, 11 Pet. 41); but the jury in such case must be satisfied "*that the property was not susceptible of any more strict and definite possession* than has been taken."

Ewing *vs.* Burnett, at p. 53.

In Ellicott *vs.* Pearl the tract of land was so large that to fence it was impracticable, and the defendant had actually entered and built houses upon a part of the land, having color of title to the whole. The case illustrates a class of cases differing widely from that at bar.

In Ewing *vs.* Burnett the court says that by reason of the steep declivity and gulleys a fence could only have been placed a short distance on one side of the lot, and the acts of ownership proven were all that, under the conditions, could be done to indicate possession and claim.

In this case there was no good reason why the lot should not have been enclosed, or some sign given to indicate that it was held under claim of right.

Sharon *vs.* Tucker, 144 U. S. 533.

The possession of Rothwell at any time prior to 1874 was "not actual, but constructive."

III.

The prayer granted defendant assumed that there was evidence of facts as to which there was no evidence.

It told the jury that they are at liberty to find that Rothwell took possession for the purpose of a stone yard, and deposited thereon stone used by him in his business continuously, openly, adversely and uninterruptedly for a period of twenty years before the suit, and if so the plaintiff could not recover.

There was no testimony at all tending to prove these facts. Rothwell did not take possession for the purposes of a stone yard, did not deposit upon it stone used in his business, and himself testified that after attorning to Mrs. Douglas he put no stone whatever upon the lot until 1870.

There was nothing therefore in the evidence to justify this instruction.

It is submitted that the instructions prayed by the plaintiff should have been given, and the instruction given the defendant should have been rejected.

The judgment should be reversed.

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Attorney for Appellant.